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DEPARTMENT OF JUSTICE

Antitrust Division

UNITED STATES v. ECOLAB INC., et al.

Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §16(b)-(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in United States of America v. Ecolab Inc., et al., Civil Action No. 1:13-cv-444. On April 8, 2013, the United States filed a Complaint alleging that the proposed acquisition by Ecolab Inc. of Permian Mud Service, Inc., would violate Section 7 of the Clayton Act, 15 U.S.C. §18. The proposed Final Judgment, filed the same time as the Complaint, requires Ecolab Inc. to divest certain assets Permian has been using to provide deepwater production chemical management services in the Gulf of Mexico.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW, Suite 1010, Washington, DC 20530 (telephone: 202-514-2481), on the Department of Justice's website at http://www.usdoj.gov/atr, and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments and responses thereto, will be filed with the Court and posted on the U.S. Department of Justice, Antitrust Division's website, and, under certain circumstances published in the *Federal Register*.

Comments should be directed to William H. Stallings, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, N.W., Suite 7000, Washington, DC 20530, (telephone: 202-514-9323).

Patricia A. Brink
Director of Civil Enforcement

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA<br>U.S. Department of Justice<br>Antitrust Division<br>450 5th Street, NW<br>Suite 8000<br>Washington, DC 20001<br><br>*Plaintiff*,<br>v.<br>ECOLAB INC.<br>370 Wabasha St. North<br>St. Paul, MN 55102, and<br><br>PERMIAN MUD SERVICE, INC.,<br>3200 Southwest Freeway<br>Houston, TX 77027,<br><br>*Defendants*. | ) | Case 1:13-cv-00444<br>Filed 04/08/2013 |

## COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to enjoin the acquisition of Permian Mud Service, Inc., ("Permian"), by Ecolab Inc. ("Ecolab"), and to obtain other equitable relief. The United States complains and alleges as follows:

## I. NATURE OF THE ACTION

1. Ecolab's acquisition of Permian would combine the two leading providers of production chemical management services for deepwater oil and gas wells ("deepwater PCMS") in the U.S. Gulf of Mexico ("Gulf"). Deepwater PCMS providers design, produce, and apply specially formulated chemical solutions to oil or gas wells to facilitate hydrocarbon production and protect well infrastructure.

2. Permian's wholly owned subsidiary, Champion Technologies, Inc. ("Champion"), and Ecolab's wholly-owned subsidiary, Nalco Company ("Nalco"), are the two largest suppliers of deepwater PCMS in the Gulf and vigorously compete head-to-head to win the business of oil and gas exploration and production companies ("E&P companies"). If the transaction is allowed to proceed, this competition will be lost and the merged firm will control approximately 70% of the market, leading to higher prices, reduced service quality, and diminished innovation.

3. Accordingly, as alleged more specifically below, the acquisition, if consummated, would likely substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

## II. THE PARTIES AND THE TRANSACTION

4. Ecolab is a Delaware corporation headquartered in St. Paul, Minnesota. Nalco, its wholly-owned subsidiary, is headquartered in Naperville, Illinois and supplies the oil and gas industry with deepwater PCMS through its Energy Services Division. Ecolab generated $1.87 billion in revenues from oil and gas-related products and services in 2011. Nalco is currently the largest supplier of deepwater PCMS in the Gulf.

5. Permian is a Texas corporation headquartered in Houston, Texas. Permian provides specialty chemicals and services to the oil and gas industry and generated $1.25 billion in revenues in 2011. Permian's wholly-owned subsidiary, Champion, is also a Texas corporation and is currently the second largest provider of deepwater PCMS in the Gulf.

6. Pursuant to an agreement dated October 11, 2012, Ecolab agreed to purchase Permian for $2.2 billion. The Defendants amended the Agreement and Plan of Merger on November 28, 2012 ("First Amendment"), on November 30, 2012 ("Second Amendment") to exclude certain assets and adjust the purchase price to $2.16 billion, and again on December 28, 2012 ("Third Amendment").

## III. JURISDICTION AND VENUE

7. The United States brings this action pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18.

8. Ecolab and Permian provide deepwater PCMS in the flow of interstate commerce and their provision of deepwater PCMS substantially affects interstate commerce. The Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

9. Ecolab and Permian have consented to venue and personal jurisdiction in this judicial district.

## IV. TRADE AND COMMERCE

### A. The Provision of Deepwater PCMS in the Gulf

10. E&P companies rely on the services of deepwater PCMS providers to facilitate the safe and efficient production of oil and gas from deepwater wells in the Gulf. Throughout the production process, deepwater PCMS providers treat wells with blends of chemicals to prevent naturally occurring material, such as scale, paraffin, and hydrates, from blocking the flow of hydrocarbons to the production platform; protect the well's infrastructure from corrosion and damage; enable the E&P company to efficiently separate the mix of oil, water, and gas produced by the well; and remove or neutralize unwanted substances, such as hydrogen sulfide gas, from the production.

11. Although onshore and shallow water wells also require PCMS, deepwater wells (wells drilled in water depths greater than 1,000 feet) generally present challenging production issues due to the complex infrastructure of many deepwater wells and the high temperatures and pressures often found in deepwater wells.

12. Due to the time and expense required to construct a new production platform in deepwater, E&P companies frequently opt to build "subsea wells," which can connect to existing offshore production platforms up to 70 miles away, instead of "dry-tree" wells, which must be stationed very close to the production platform. Deepwater PCMS providers must deliver chemicals to subsea wellbores through "umbilicals," which are clusters of extremely narrow chemical injection, hydraulic, and fiber-optic lines that extend from the production platform to the well. Because of the complexities of this delivery system and the expense of repairing a

chemical line clogged by impure or unstable chemicals, E&P companies impose strict qualification and quality control requirements on chemicals administered through umbilicals.

13. Strings of narrow piping called "flow lines" transport oil and gas from a subsea well to the production platform. Because flow lines run along the seafloor, they expose the produced oil, water, and gas to cold temperatures that cause solids to form and block the flow line. Deepwater PCMS providers must specially formulate chemicals for deepwater subsea wells that inhibit the formation or accumulation of solids during prolonged exposure to seafloor temperatures.

14. Deepwater wells often share characteristics that complicate production *(e.g.*, high pressures and temperatures), but each deepwater well has unique characteristics that determine its production challenges. E&P companies rely on PCMS providers to assess these characteristics and develop formulations specific to each well. When devising a treatment program, PCMS providers consider the makeup of the well's hydrocarbons, formation rock, and water; as well as conditions the hydrocarbons and chemicals will face inside the well and during production, such as extreme temperatures and pressures. PCMS providers test potential formulations in laboratories that can replicate conditions inside the well before settling on the chemical formulations, application techniques, and level of service they will recommend for a specific project.

15. A deepwater PCMS provider needs a strong staff of experts to successfully compete in the deepwater Gulf. E&P customers hire PCMS providers to assess and solve their production challenges and continuously manage the well's treatment. They expect PCMS providers to have highly trained and knowledgeable employees to monitor each well on an ongoing basis, devise new treatment programs when circumstances change, and prepare

recommendations for potential opportunities. PCMS providers also require subject matter experts who can develop new products and technologies that are effective in whatever novel environments E&P companies operate.

16. E&P companies typically procure deepwater PCMS through a formal or informal bidding process. Potential suppliers are asked to submit a proposal including the recommended treatment plan; test results to support the treatment plan; prices; past experiences with similar well-conditions; safety records; information on the company's supply chain, training programs, lab facilities, and R&D programs; and the resumés or experience levels of proposed service personnel.

17. Customers choose a PCMS provider based on a number of factors, including, but not limited to, the efficacy of the proposed treatment program, price, the provider's prior track record servicing deepwater wells, and the provider's ability to offer timely and competent service. Customers also consider the provider's research and development ("R&D") program and ability to advise on the optimal well design of new projects.

18. Although deepwater PCMS represents a fraction of an E&P company's overall cost of production, the costs associated with delay or failure are high. If the deepwater PCMS provider selects the wrong chemicals or fails to adequately monitor or service the well, it can cost the customer millions in lost production or compromise the well's infrastructure.

19. Because of the value of deepwater wells and the risks of improper treatment, some customers will only accept a bid for a particular project from a supplier whom it has thoroughly vetted and pre-qualified. As a result, deepwater PCMS providers sometimes compete to be designated as preferred or pre-qualified suppliers. Preferred suppliers may then bid against each other for specific projects.

20. There are often only two or three bidders for each deepwater PCMS contract in the Gulf, and the bidders typically know whom they are competing against for a particular project. Nalco and Champion are the two largest deepwater PCMS providers in the Gulf and compete head-to-head on a substantial number of deepwater PCMS opportunities.

**B. The Provision of Deepwater PCMS Is a Relevant Product Market**

21. The provision of deepwater PCMS is a relevant product market and line of commerce under Section 7 of the Clayton Act. E&P companies are unlikely to forego use of PCMS providers or switch to PCMS providers that only have experience onshore or in shallow water in response to a small but significant and non-transitory increase in deepwater PCMS prices.

22. The risks of not using a PCMS provider, or using a PCMS provider without deepwater operations or experience, greatly outweigh the potential cost savings. Deepwater wells present unique production issues and operational challenges. The costs of a clogged umbilical line are substantial, while the cost of deepwater PCMS is a small fraction of the E&P company's total operational costs. Improper deepwater PCMS treatment can force an E&P company to replace a chemical line, shutdown production to make repairs, or forego the profits of full production rates achievable through proper PCMS treatment.

23. Deepwater PCMS are not reasonably interchangeable with onshore or shallow water PCMS. Because deepwater basins have unique characteristics and well infrastructure, providers of onshore or shallow water PCMS typically do not have the relevant know-how and experience required to effectively treat deepwater wells. Although there are some subsea wells in shallow water, they are typically closer to the production platform than deepwater subsea wells, so the operational difficulties engendered by umbilicals and flow lines are often less

severe in shallow water. Additionally, the geological characteristics of shallow-water areas of the Gulf differ from its deepwater areas, so PCMS providers active in shallow water do not have the same familiarity or experience with the formation rocks or hydrocarbons found in deepwater. Importantly, because deepwater operations differ, onshore and shallow water PCMS providers also typically lack a complete suite of chemicals that can tolerate umbilical injection or the high pressures and temperatures typically found in deepwater wells and the necessary lab and filtration equipment to develop and qualify a chemical for umbilical injection or deepwater use.

**C. The U.S. Gulf of Mexico Is a Relevant Geographic Market**

24. The U.S. Gulf of Mexico is a relevant geographic market for the provision of deepwater PCMS under Section 7 of the Clayton Act. E&P companies operating in the Gulf are unlikely to switch to a PCMS provider without local infrastructure or Gulf-specific deepwater experience and expertise in the event of a small but significant and non-transitory increase in price.

25. E&P companies operating deepwater wells in the Gulf require their PCMS suppliers to have local infrastructure, such as distribution centers, blending facilities, analytical laboratories and sales and technical personnel, so that the PCMS provider can have the resources it needs nearby to monitor the well and quickly address production challenges. These E&P companies will not select a deepwater PCMS provider that lacks the Gulf-based infrastructure necessary to effectively service their projects.

26. Although experience in another deepwater basin may be relevant to deepwater Gulf operations, each deepwater basin presents unique production challenges resulting from its unique combination of hydrocarbons, produced water, and geological characteristics. PCMS

providers operating in other deepwater basins are unlikely to have the depth of experience with the particular production challenges that frequently affect deepwater wells in the Gulf. Customers are unlikely to entrust their wells to PCMS providers without this essential experience.

**D. Market Participants**

27. The defendants are the two largest providers of deepwater PCMS in the Gulf. One additional firm has significant deepwater PCMS experience in the Gulf and regularly competes against Nalco and Champion for deepwater PCMS opportunities. A handful of other firms provide deepwater PCMS but lack the robust track record, requisite personnel, and proven product lines that make Champion and Nalco successful competitors. Additionally, these other firms do not compete for the majority of deepwater PCMS opportunities.

## V. LIKELY ANTICOMPETITIVE EFFECTS

**A. Market Shares and Concentration**

28. The relevant market is highly concentrated and would become more concentrated as a result of the proposed transaction. Based on 2012 revenues, Champion's share of the deepwater PCMS market in the Gulf was 34% while Nalco's was 38%.

29. Concentration in relevant markets is typically measured by the Herfindahl-Hirschman Index ("HHI").[1] Market concentration is often one useful indicator of the likely competitive effects of a merger. The more concentrated a market, and the more a transaction

[1] *See* U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 5.3 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

would increase concentration in a market, the more likely it is that a transaction would result in a meaningful reduction in competition that would result in harm. Markets in which the HHI is above 2,500 points are considered highly concentrated. Transactions that increase the HHI by more than 200 points in highly concentrated markets will be presumed likely to enhance market power.

30. The deepwater PCMS market in the Gulf currently is highly concentrated, with an HHI of over 2,900. The proposed merger would significantly increase the HHI by 2,607, rendering the transaction presumptively anticompetitive.

**B. Likely Anticompetitive Effects**

31. Ecolab's acquisition of Permian would combine their respective subsidiaries, Nalco and Champion, the two leading deepwater PCMS providers in the Gulf, creating a dominant firm with a greater than 70% market share. Nalco and Champion vigorously compete on price, terms of sale, service quality, and product development. They have spurred each other to develop and improve products, performance and technology, and customers have benefitted from this competition. The transaction would eliminate the head-to-head competition between Nalco and Champion to provide deepwater PCMS in the Gulf.

32. Nalco and Champion provide deepwater PCMS to wells with similar production issues in similar water depths and are two of the few firms that have the manpower, technical capabilities and expertise to service the Gulf's most challenging wells. Nalco and Champion routinely bid against each other on the same deepwater projects in the Gulf and are considered by many E&P customers to be close substitutes.

33. Customers differentiate among deepwater PCMS providers on the basis of price, reputation, service quality, product effectiveness, and other factors. Nalco's acquisition of

Champion would eliminate many customers' preferred alternative to Nalco and reduce the number of preferred or capable bidders on many projects from three to two. Post-acquisition, Nalco would gain the incentive and ability to profitably raise its bid prices significantly above pre-acquisition levels, reduce its investment in R&D, or provide lower levels of service.

34. The response of the remaining deepwater PCMS firm would not be sufficient to constrain an exercise of market power by Nalco after the acquisition. Having removed its closest substitute for many customers, Nalco would be aware that many customers now have a stronger preference for it as a supplier, allowing Nalco to raise prices above pre-acquisition levels, relax its service standards, and scale back its efforts to innovate. Deepwater PCMS providers in the Gulf that lack an established track record and experienced personnel are not invited to bid on many projects.

## VI. ENTRY AND EFFICIENCIES

35. Entry by a new PCMS service provider or expansion of existing marginal suppliers would not be timely, likely, and sufficient to prevent the substantial lessening of competition caused by the elimination of Champion as an independent competitor.

36. Successful entry into the provision of deepwater PCMS in the Gulf is difficult, costly, and time consuming. To compete, a deepwater PCMS supplier must have local infrastructure, a full line of production chemicals designed for deepwater use, experienced staff, and a track record of successfully treating deepwater wells in the Gulf. Because of the significant investment E&P companies make in deepwater wells and the high costs of any problem or delay, these firms disfavor the risks of using new suppliers or switching between established suppliers, making it difficult for new PCMS providers to enter the market or grow their business.

37. Developing a track record of successfully treating deepwater wells in the Gulf is arduous and takes substantial time. E&P companies typically avoid the cost and delay involved in evaluating and monitoring a new supplier unless the existing supplier exhibits poor performance over a long period of time. Additionally, many E&P companies refuse to be the first customer to use a new deepwater PCMS provider, while others will only use a deepwater PCMS provider after the provider has developed a track record over a number of years.

38. A potential entrant may also face problems acquiring sufficient manpower to expand its business or enter at all. E&P companies require deepwater PCMS providers to commit a number of personnel with significant deepwater experience to the well, and also expect the provider to staff its laboratories and R&D facilities with deepwater experts. It takes existing deepwater PCMS providers years to train employees before they can accumulate deepwater experience and expertise.

39. Defendants cannot demonstrate cognizable and merger-specific efficiencies that would be sufficient to offset the transaction's anticompetitive effects.

## VII. VIOLATION ALLEGED

40. The effect of Ecolab's proposed acquisition of Permian if it were consummated, would likely be to lessen substantially competition for deepwater PCMS in the Gulf in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Unless restrained, the transaction would likely have the following effects, among others:

a) competition in the market for deepwater PCMS in the Gulf would be substantially lessened;

b) prices for deepwater PCMS in the Gulf would increase;

c) the quality of deepwater PCMS services in the Gulf would decrease; and

d) innovation in the deepwater PCMS market in the Gulf would diminish.

## VIII. REQUESTED RELIEF

41. Plaintiff requests that this Court:

a) Adjudge Ecolab's proposed acquisition of Permian to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

b) Permanently enjoin and restrain Defendants from consummating the proposed acquisition by Ecolab of Permian or from entering into or carrying out any contract, agreement, plan, or understanding, the effect of which would be to combine Ecolab and Permian;

c) Award the United States its costs for this action; and

d) Award the United States such other and further relief as the Court deems just and proper.

Dated: April 8, 2013

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

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Acting Assistant Attorney General

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**UNITED STATES DISTRICT COURT**
**DISTRICT OF COLUMBIA**

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| UNITED STATES OF AMERICA,<br>*Plaintiff*,<br>v.<br>ECOLAB INC., and<br>PERMIAN MUD SERVICE, INC.,<br>*Defendants*. | Case No.: Case 1:13-cv-00444<br>FILED: 04/08/2013 |

## COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

### I. NATURE AND PURPOSE OF THE PROCEEDING

Defendant Ecolab Inc. ("Ecolab") and Defendant Permian Mud Service, Inc. ("Permian") entered into an Agreement and Plan of Merger, dated October 11, 2012, pursuant to which Ecolab would acquire Permian ("proposed transaction"). Ecolab's wholly-owned subsidiary, Nalco Company ("Nalco") and Permian's wholly-owned subsidiary, Champion Technologies, Inc. ("Champion"), compete head-to-head to provide production chemical management services for oil and gas wells drilled in over 1,000 feet of water ("deepwater PCMS") in the United States Gulf of Mexico ("Gulf"). Nalco and Champion are the two leading providers of deepwater PCMS in the Gulf and together control over 70% of the market.

The United States filed a civil antitrust Complaint on April 8, 2013, seeking to enjoin Ecolab's acquisition of Permian. The Complaint alleges that the proposed transaction is likely to lessen competition substantially for deepwater PCMS in the Gulf in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition is likely to lead to higher prices, reduced service quality, and diminished innovation for deepwater PCMS in the Gulf.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the transaction. Under the proposed Final Judgment, the terms of which are explained more fully below, Ecolab is required to divest a package of assets that Champion has been using to provide deepwater PCMS in the Gulf. Under the terms of the Hold Separate Stipulation and Order, Ecolab will take certain steps to ensure that Champion is operated as a competitively independent, economically viable and ongoing business concern, that competition is maintained during the pendency of the ordered divestiture, and that the divestiture assets are preserved and maintained.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

## II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

### A. The Defendants and the Industry

Ecolab provides products and services to the energy, foodservice, and healthcare, industries. Nalco, its wholly-owned subsidiary, supplies the oil and gas industry with deepwater

PCMS through its Energy Services Division, which generated $1.87 billion in revenues in 2011. Nalco is currently the largest provider of deepwater PCMS in the Gulf.

Permian provides specialty chemicals and services to the oil and gas industry through its subsidiaries, which jointly generated $1.25 billion in revenues in 2011. Permian supplies deepwater PCMS through its wholly-owned subsidiary, Champion, which is currently the second largest provider of deepwater PCMS in the Gulf.

Deepwater PCMS providers treat deepwater oil and gas wells with blends of chemicals that prevent naturally occurring material, such as scale, paraffin, and hydrates, from blocking the flow of hydrocarbons to the production platform; protect well infrastructure and equipment from corrosion and damage; enable efficient separation of the mix of oil, water, and gas produced by the well; and remove or neutralize unwanted substances, such as hydrogen sulfide gas, from the production.

Oil and gas exploration and production companies ("E&P companies"), who own and operate oil and gas wells, must purchase production chemical management services to safely and efficiently produce oil and gas from onshore, shallow water, and deepwater wells (those drilled in over 1,000 feet of water). However, the complex infrastructure of deepwater wells often requires deepwater PCMS providers to develop solutions that are generally unnecessary onshore or in shallow water. For instance, due to the time and expense required to construct a new production platform in deepwater, E&P companies frequently opt to build deepwater "subsea wells," which can connect to existing offshore production platforms up to 70 miles away, instead of "dry-tree" wells, which must be stationed very close to the production platform.

To service these wells, deepwater PCMS providers must deliver chemicals through "umbilicals," which are clusters of extremely narrow chemical injection, hydraulic, and fiber-optic lines that extend from the production platform to the well. Because of the complexities of this delivery system and the expense of repairing a chemical line clogged by impure or unstable chemicals, E&P companies impose strict qualification and quality control requirements on chemicals administered through umbilicals.

Strings of narrow piping called "flow lines" transport oil and gas from a subsea well to the production platform. Because flow lines run along the seafloor, they expose the produced oil, water, and gas to cold temperatures that cause solids to form and block the flow line. Deepwater PCMS providers must specially formulate chemicals for deepwater subsea wells that inhibit the formation or accumulation of solids during prolonged exposure to seafloor temperatures.

In addition to these operational complexities, deepwater wells often present challenging production issues stemming from the high pressures and temperatures common in such wells. Each deepwater well has unique characteristics, which PCMS providers must assess to identify production challenges and develop an appropriate treatment plan. Deepwater wells also typically contain large reserves and are more expensive to repair than onshore or shallow water wells. For these reasons, most E&P companies operating deepwater wells are extremely risk-averse and seek out PCMS providers and personnel with Gulf-specific deepwater experience and expertise to service their wells. They also typically require deepwater PCMS providers to have more sophisticated laboratories, research and development ("R&D") programs, and supply chain and quality control operations than onshore or shallow water PCMS providers.

## B. The Competitive Effects of the Transaction in the Market for Deepwater PCMS in the Gulf

### *1. The Provision of Deepwater PCMS Is a Relevant Product Market*

The United States alleges that the provision of deepwater PCMS is a line of commerce and a relevant market within the meaning of Section 7 of the Clayton Act. E&P companies are unlikely to forego use of PCMS providers or switch to PCMS providers that only have experience onshore or in shallow water in response to a small but significant and non-transitory increase in deepwater PCMS prices.

The risks of not using a PCMS provider, or using a PCMS provider without deepwater operations or experience, greatly outweigh the potential cost savings. Deepwater PCMS represent a fraction of the overall cost of producing oil and gas from a deepwater well, but improper deepwater PCMS treatment can cost an E&P company millions in lost production or compromise the well's infrastructure. As a result, E&P companies are unlikely to forego use of PCMS providers or switch to PCMS providers that only have experience onshore or in shallow water in response to a small but significant and non-transitory increase in deepwater PCMS prices.

Deepwater PCMS are not reasonably interchangeable with onshore or shallow water PCMS. Because deepwater basins have unique characteristics and well infrastructure, providers of onshore or shallow water PCMS typically do not have the relevant know-how and experience required to effectively treat deepwater wells. Although there are some subsea wells in shallow water, they are typically closer to the production platform than deepwater subsea wells, so the operational difficulties engendered by umbilicals and flow lines are often less severe in shallow water. Additionally, the geological characteristics of shallow-water areas of the Gulf differ from its deepwater areas, so PCMS providers active in shallow water do not have the same familiarity or experience with the formation rocks or hydrocarbons found in deepwater. Importantly, because deepwater operations differ, onshore and shallow water PCMS providers also typically lack a complete suite of chemicals that can tolerate umbilical injection or the high pressures and temperatures typically found in deepwater wells and generally do not have the necessary lab and filtration equipment to develop and qualify a chemical for umbilical injection or deepwater use.

### *2. The United States Gulf of Mexico Is a Relevant Geographic Market*

The United States Gulf of Mexico is a relevant geographic market for the provision of deepwater PCMS under Section 7 of the Clayton Act. E&P companies operating in the Gulf are unlikely to switch to a PCMS provider without local infrastructure or Gulf-specific deepwater experience and expertise in the event of a small but significant and non-transitory increase in price.

E&P companies operating deepwater wells in the Gulf require their PCMS suppliers to have local infrastructure, such as distribution centers, blending facilities, analytical laboratories, and sales and technical personnel, so that the PCMS provider can have the resources it needs nearby to monitor the well and quickly address production challenges. These E&P companies will not select a deepwater PCMS provider that lacks the Gulf-based infrastructure necessary to effectively service the E&P companies' projects.

Although experience in another deepwater basin may be relevant to deepwater Gulf operations, each deepwater basin presents unique production challenges resulting from its unique combination of hydrocarbons, produced water, and geological characteristics. PCMS providers operating in other deepwater basins are unlikely to have the depth of experience with the particular production challenges that frequently affect deepwater wells in the Gulf. E&P

companies are unlikely to entrust their wells to PCMS providers without this essential experience.

### *3. The Anticompetitive Effects of the Proposed Transaction*

The market for the provision of deepwater PCMS in the Gulf is highly concentrated and would become more concentrated as a result of the proposed transaction. Based on 2012 revenues, a combined Champion and Nalco would control 70% of the market for deepwater PCMS in the Gulf.

The proposed transaction would eliminate the significant head-to-head competition between Nalco and Champion to provide deepwater PCMS in the Gulf. Nalco and Champion frequently compete for the same deepwater opportunities in the Gulf. They have spurred each other to develop and improve products, performance and technology, and customers have benefitted from this competition.

Nalco's acquisition of Champion would eliminate many customers' preferred alternative to Nalco and reduce the number of preferred or capable bidders on many projects from three to two. Post-acquisition, Nalco would gain the incentive and ability to profitably raise its bid prices significantly above pre-acquisition levels, reduce its investment in R&D, or provide lower levels of service.

### *4. Entry and Expansion Are Unlikely to Prevent the Competitive Effects of the Proposed Transaction*

Entry by a new PCMS service provider or expansion of existing suppliers would not be timely, likely, and sufficient to prevent the substantial lessening of competition caused by the elimination of Champion as an independent competitor.

Successful entry into the provision of deepwater PCMS in the Gulf is difficult, costly, and time-consuming. To compete, a deepwater PCMS supplier must have local infrastructure, a full line of production chemicals designed for deepwater use, experienced staff, and a track record of successfully treating deepwater wells in the Gulf. Because of the significant investment E&P companies make in deepwater wells and the high costs of any problem or delay, these firms disfavor using new suppliers or switching between established suppliers, making it difficult for new deepwater PCMS providers to enter the market or grow their business.

Developing a track record of successfully treating deepwater wells in the Gulf is arduous and takes substantial time. E&P companies typically avoid the cost and delay involved in evaluating and monitoring a new supplier unless the existing supplier exhibits poor performance over a long period of time. Additionally, many E&P companies refuse to be the first customer to use a new deepwater PCMS provider, while others will only use a deepwater PCMS provider after the provider has developed a track record over a number of years.

A new deepwater PCMS provider may also face challenges acquiring sufficient manpower to expand its business or enter at all. E&P companies require deepwater PCMS providers to commit a number of personnel with significant deepwater experience to the well, and also expect the provider to staff its laboratories and R&D facilities with deepwater experts. It takes existing deepwater PCMS providers years to train employees before they can accumulate deepwater experience and expertise.

## III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment will eliminate the likely anticompetitive effects of the merger in the market for deepwater PCMS in the Gulf by establishing a new, independent, and economically viable competitor. The package of divestiture assets provides the acquirer with the assets it needs to establish a significant presence in the Gulf and become an effective competitor, including the tangible and intangible assets that Champion currently uses to provide PCMS to deepwater wells in the Gulf, the option to acquire Champion's storage, distribution, filtration, and quality control facility in Broussard, Louisiana, and a short-term chemical supply agreement that will allow the acquirer to immediately begin supplying Champion customers with the production chemicals they currently use and trust. In addition, because experienced personnel are critical to success in the deepwater PCMS business in the Gulf – and will be even more important to a new entrant seeking to secure the trust and business of risk-averse customers – the divestiture package provides the acquirer with an expansive right to hire relevant Champion personnel without interference from the merged firm.

**A. Identification of an Upfront Buyer**

The overriding goal of the proposed Final Judgment is to provide the acquirer with everything it needs to effectively compete to provide deepwater PCMS in the Gulf. Where possible, the United States favors the divestiture of an existing business unit that has already demonstrated its ability to compete in the relevant market. In this case, however, neither Defendant has a standalone deepwater PCMS business in the Gulf. Rather, the employees, facilities, and other assets relating to the Defendants' deepwater PCMS operations in the Gulf are deeply intertwined with the Defendants' PCMS operations in other regions and other business lines. To ensure that the acquirer will have all assets necessary to be an effective, long-term competitor, while minimizing disruption to Defendants' broader operations, the proposed Final

Judgment assembles a set of assets that will enable the acquirer to effectively preserve competition.

As explained in the *Antitrust Division Policy Guide to Merger Remedies*, the Antitrust Division may require an upfront buyer when a divestiture package is less than an existing business entity.[2] Here, Defendants have identified Clariant Corporation and its parent, Clariant International Ltd. (collectively, "Clariant"), as an upfront buyer for the divestiture package. Clariant International Ltd. is a Swiss corporation that develops, produces, and markets chemicals for a variety of industries around the world. Clariant's Oil & Mining Services Group, headquartered in Houston, Texas, provides PCMS throughout the world. Clariant is the fourth largest PCMS provider globally and has significant deepwater PCMS experience outside the Gulf. Its ability to successfully manage a deepwater PCMS business in other regions provides confidence that with the divestiture package, it will be able to do so in the Gulf. Clariant has targeted the deepwater PCMS market in the Gulf as an area for growth, and recently built a state-of-the-art deepwater PCMS laboratory in The Woodlands, Texas. For these reasons, the United States has concluded that Clariant has the intent and capability, as a result of this settlement, to be an effective competitor in the provision of deepwater PCMS in the Gulf and is an acceptable acquirer of the divestiture assets. Therefore, the proposed Final Judgment designates Clariant as the Acquirer.[3]

**B. The Divestiture Package**

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[2] U.S. Department of Justice, Antitrust Division Policy Guide to Merger Remedies (June 2011), *available at* http://www.justice.gov/atr/public/guidelines/272350.pdf (Identifying an upfront buyer provides greater assurance that the divestiture package contains the assets needed to create a viable entity that will preserve competition.).

[3] The proposed Final Judgment provides for an alternative sale should a problem arise with the upfront buyer. If the Defendants fail to divest the Divestiture Assets to Clariant within ten days of the Court signing the Hold Separate Stipulation and Order in this matter, the United States may request that the Court appoint a trustee to sell the Divestiture assets. The trustee may sell the Divestiture Assets to an acquirer acceptable to the United States.

The divestiture package, which is fully described in the proposed Final Judgment, includes, among other things, Champion deepwater chemicals and know-how, a broad right to hire, the tangible and intangible assets Champion currently uses to serve customers in the Gulf, and additional rights and options designed to transfer know-how and customer accounts to the acquirer, which are discussed in more detail below.

### *1. Champion Deepwater Chemicals and Know-How*

The proposed Final Judgment transfers to the acquirer the chemical formulations and know-how that allow Champion to successfully compete for deepwater PCMS opportunities in the Gulf. Going forward, the acquirer will have exclusive rights in the Gulf to provide the chemical formulations that Champion's current customers use and trust, and the know-how needed to apply these formulations effectively to current and future projects.

Defendants use a variety of specially-formulated chemical solutions to provide deepwater PCMS in the Gulf. Although many of the raw chemicals used in these blends are manufactured by third parties, each deepwater PCMS provider in the Gulf has its own unique formulations and know-how relating to the blending and use of these chemicals. These formulations and know-how represent an important qualitative aspect of the deepwater PCMS provided by the Defendants.

Established PCMS providers routinely rely on case histories and past performance data to identify the best chemical formulation for a new project and demonstrate its suitability to prospective customers. New entrants can only offer chemical formulations without a track record of success or wealth of instructive data points. The divestiture package gives the acquirer the ability to offer tried and true chemical formulations, which are expected to reduce customers' aversion to trying a new deepwater PCMS provider.

The proposed Final Judgment provides the acquirer with a patent for Champion's most lucrative production chemical in the Gulf, a low dose hydrate inhibitor critical to many E&P companies' operations in the deepwater Gulf, and exclusive licenses within the deepwater Gulf for all other production chemicals used by Champion in the Gulf.[4] It also provides the acquirer with the know-how and other intangible assets (*e.g.*, case histories, formulations, product bulletins, and manufacturing instructions) needed to effectively make and apply these production chemicals.

***2. Right to Hire***

The proposed Final Judgment provides the acquirer with an expansive right to hire all Champion employees whose job responsibilities relate to the provision of deepwater PCMS in the Gulf. As discussed above, the provision of deepwater PCMS is a service business in which customers place great weight on the expertise, know-how and experience of the individuals working on their accounts. The acquirer's right to hire Champion personnel with deepwater PCMS experience in the Gulf will provide the acquirer with the qualified employees it needs to serve Champion's existing accounts and compete for new projects.

The proposed Final Judgment contains numerous provisions to facilitate the acquirer's ability to hire and retain these employees. The Defendants will provide the acquirer with detailed information about each relevant employee, including his or her responsibilities, job titles, past deepwater PCMS experience in the Gulf, education, training, and salary. The Defendants also will grant the acquirer reasonable access to employees and the ability to

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[4] Champion uses these production chemicals to support other product lines (e.g., onshore PCMS) and other geographic regions, and Clariant, the likely acquirer, already has a full suite of production chemicals that it uses in other regions and for other applications. Therefore, the Division has determined that it is appropriate in this case for Defendants to retain rights to use these production chemicals outside the Gulf. *See Antitrust Division Policy Guide to Merger Remedies,* at 11 n. 23 ("When a patent covers the right to compete in multiple product or geographic markets, yet the merger adversely affects competition in only a subset of these markets, the Division will insist on the sale or license of rights necessary to effectively preserve competition in the affected markets. In some cases, this may require that the purchaser or licensee obtain the rights to produce and sell only the relevant product.").

interview them. The Defendants are specifically prohibited from interfering with the acquirer's negotiations to hire any relevant employee. For example, if an employee agrees to work for the acquirer, the Defendants must vest such employees' unvested pensions or other equity rights. Importantly, the Defendants must also waive any applicable non-compete or non-disclosure agreement covering information related to the divestiture assets so that the employee may freely provide services to the acquirer and its customers. To allow the acquirer time to develop the business without the risk of Defendants targeting relevant employees to undermine the divestiture, the Defendants are also prohibited for a period of time from soliciting to hire or hiring any relevant employee that is hired by the acquirer.

***3. Broussard Facility and Laboratory Equipment***

The proposed Final Judgment grants the acquirer the option to purchase certain facilities and lab equipment that Champion uses in connection with its deepwater PCMS Gulf business. These optional divestiture assets include Champion's Broussard, Louisiana warehouse and distribution facility, which also contains chemical filtration equipment and a quality control laboratory; Champion laboratory equipment used in providing deepwater PCMS; and tangible assets used to provide deepwater PCMS to any customer that elects to transition its contract or business to the acquirer. Customers prefer PCMS providers to have facilities and equipment close to the Gulf. Some potential acquirers – such as Clariant – already have similar facilities. The Final Judgment preserves maximum flexibility by granting the acquirer the option to secure the Champion facilities and equipment it needs to compete, without forcing it to purchase assets that are duplicative of its existing operations.

***4. Supply of Chemicals***

The proposed Final Judgment grants to the acquirer an option to enter into a short-term supply agreement with the Defendants for chemicals licensed or divested to the acquirer. This provision will provide the acquirer with a trusted supply chain while it makes arrangements to produce such chemicals in-house or obtain them from other manufacturers. The supply agreement will assure customers that they will receive the same chemicals from the acquirer that they are currently receiving from Champion.

The proposed Final Judgment does not require divestiture of Defendants' chemical manufacturing plants, which are substantial facilities that support their broader PCMS operations and have significantly more capacity than an acquirer would need to produce production chemicals for the deepwater Gulf.[5] Clariant has manufacturing capabilities that it can dedicate to production of chemicals for deepwater Gulf applications. Moreover, many chemical intermediates that are used to produce the finished production chemical are widely available commodities.

### *5. Customer Transfer*

The proposed Final Judgment contains provisions designed to facilitate the transfer of current customer contracts to provide deepwater PCMS in the Gulf from Champion to the acquirer. In a typical divestiture of a line of business, the ongoing customer contracts usually will transfer with the business unit being divested. Here, there is no line of business being divested and contracts cannot be assigned without customer consent. To encourage customers to transition their

[5] Each of the Defendants' manufacturing facilities contains a variety of vessels capable of performing distinct chemical reactions. No manufacturing plant is capable of performing all of the chemical reactions needed to manufacture a full suite of deepwater suitable chemicals. As a result, it is not possible to allocate a portion of a single plant to the Acquirer.

business to the acquirer, the proposed Final Judgment contains certain incentives. For example, as discussed above, the acquirer will have the exclusive right to provide the chemicals Champion is currently providing deepwater PCMS customers in the Gulf, and access to the know-how and employees that currently allow Champion to provide deepwater PCMS to customers in the Gulf. As such, the acquirer will be able to step into Champion's shoes and continue to provide ongoing services to customers.

In addition, the proposed Final Judgment requires that the Defendants use their "best efforts" to convince customers to move their business to the acquirer. As a way of assuring customers that such a transition will be smooth, the proposed Final Judgment permits the acquirer to purchase the tangible assets used to provide PCMS to any customer that elects to transition its contract or business to the acquirer. At the option of the acquirer, the Defendants also must provide transitional services sufficient to meet the acquirer's needs for assistance in matters relating to the design, manufacture, formulation, testing, provision, or application of production chemicals for any customer. This provision will allow the acquirer broad access to Champion know-how or expertise related to its provision of deepwater PCMS in the Gulf not ascertainable through its divestiture of case histories and other intangible assets. Deepwater PCMS providers commonly cooperate to prevent operational challenges when a customer chooses a new provider to manage a platform or well. The proposed Final Judgment gives the acquirer the option of requesting additional assistance when taking over Champion's existing accounts.[6]

**C. Procedures**

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[6] Should a customer elect not to move its business to the acquirer, the proposed Final Judgment provides that Champion may continue to service that customer's business for a limited period of six months (extendable up to a total of one year at the sole discretion of the United States upon a showing of good cause).

The proposed Final Judgment requires Defendants to divest to Clariant the divestiture assets within 10 days after the Court signs the Hold Separate Stipulation and Order in this matter. The assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the assets can and will used by the purchaser to compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with the Acquirer.

In the event that Defendants do not accomplish the divestiture within the prescribed periods, the proposed Final Judgment provides that upon application by the United States, the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Defendants will pay all of the trustee's costs and expenses. The trustee will have the authority to divest the divestiture assets to an acquirer acceptable to the United States. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the trustee will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

## IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

## V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

William H. Stallings
Chief, Transportation, Energy & Agriculture Section

Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 8000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

## VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Ecolab's acquisition of certain Champion assets. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of deepwater PCMS in the Gulf, the relevant market identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

## VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").[7]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree

[7] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc*., 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp*., 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

*Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).[8] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

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[8] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; see also *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[9]

## VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: April 8, 2013

Respectfully submitted,

/s/

Katherine A. Celeste

[9] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

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## CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2013, I caused a copy of the foregoing Competitive Impact Statement, Complaint, proposed Final Judgment, Hold Separate Stipulation and Order, and Plaintiff United States' Explanation of Procedures for Entry of the Final Judgment to be served on counsel for defendants in this matter in the manner set forth below:

By electronic mail:

Counsel for Defendant Ecolab Inc.
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/s/
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**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>ECOLAB INC., and<br>PERMIAN MUD SERVICE, INC.,<br><br>Defendants. | Case 1:13-cv-00444<br>Filed 04/08/2013 |

**PROPOSED FINAL JUDGMENT**

WHEREAS, Plaintiff, United States of America, filed its Complaint on April 8, 2013, the United States and Defendants, Defendant Ecolab Inc. ("Ecolab") and Defendant Permian Mud Service, Inc. ("Permian"), by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by Defendants to assure that competition is not substantially lessened;

AND WHEREAS, the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to the United States that the divestitures required below can and will be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED, AND DECREED:

## I. JURISDICTION

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

## II. DEFINITIONS

As used in this Final Judgment:

A. “Acquirer” means Clariant, the entity to which Defendants shall divest the Divestiture Assets.

B. “AKA” means a Production Chemical that has an identical formulation or chemical makeup as a Champion Deepwater Production Chemical but has a different SKU or product name.

C. “Call-off Agreement” means an agreement to provide production chemical management services for a particular asset, geographic region, or time period for a customer with whom the supplier has a Master Service Agreement in place.

D. “Broussard Facility” means Champion’s facility and other assets located at 304 Ida Rd., Broussard, Louisiana 70518.

E. “Champion” means Champion Technologies, Inc., a Texas corporation with its headquarters in Houston, Texas, its successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

F. “Champion Deepwater Gulf PCMS Customer” means any entity to which Champion provided PCMS in the Deepwater Gulf at any time between January 1, 2011 and the date the divestitures contemplated by this Final Judgment are completed.

G. “Champion Deepwater Gulf Production Chemical” means any Production Chemical used to treat an oil or gas producing well in the Deepwater Gulf, including, but not limited to, HI43 and those chemicals listed in Schedule A, and all related tangible and intangible assets.

H. “Clariant” means Clariant Corporation, the legal U.S. affiliate of Clariant International Ltd., headquartered in Charlotte, North Carolina, its successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

I. “Customer-Facing Relevant Employee” means any employee who visits a Champion Deepwater Customer’s Deepwater Gulf well or platform to provide PCMS, Relevant Employees who do not visit the Deepwater Gulf well or platform but directly supervise employees who do, or Relevant Employees who regularly interact with Champion Deepwater Gulf Customers but do not visit the customer’s Deepwater Gulf wells or platforms on a regular basis.

J. “Deepwater Gulf” means the areas of the United States Gulf of Mexico that have water depths exceeding 1,000 feet.

K. “Deepwater Gulf Well or Platform” means a well, cluster of wells, or production facility associated with a well found in the Deepwater Gulf.

L. “Divestiture Assets” means:

(1) HI43 and all related Intellectual Property Rights;

(2) Exclusive, perpetual, paid-up, non-transferable licenses for use in the Deepwater Gulf to all Intellectual Property Rights related to Champion’s provision of Deepwater Gulf PCMS and Champion Deepwater Gulf Production Chemicals that Champion has provided to a Deepwater Gulf PCMS Customer since January 1, 2012 for use in the Deepwater Gulf and any AKAs of such products. Such licenses will not be subject to any requirement to grant back to the Defendants any improvements or modifications made to these assets;

(3) All Intangible Assets, excluding Intellectual Property Rights, related to Champion’s provision of Deepwater Gulf PCMS;

(4) The option to acquire the Broussard Facility and all tangible and intangible assets used by or located at the Broussard Facility that are used to design, develop, manufacture, market, service, package, filter, blend, distribute, or test Deepwater Gulf Production Chemicals or provide PCMS to Champion Deepwater Gulf PCMS Customers;

(5) The option to acquire the Deepwater Gulf Production Chemical Equipment listed in Schedule B, delivered to the Broussard Facility or to a U.S. location specified by the Acquirer; and

(6) For each Champion Deepwater PCMS Customer who elects to transition its contract or business to the Acquirer, the option to acquire the tangible assets maintained by Champion for the purpose of providing PCMS at that Deepwater Gulf PCMS Customer’s Deepwater Gulf Well(s) or Platform(s).

M. "Ecolab" means Ecolab Inc., a Delaware corporation with its headquarters in St. Paul, MN, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

N. "Gulf" means the United States Gulf of Mexico.

O. "HI43" means Champion's low dose hydrate inhibitor Production Chemical claimed in U.S. Patent No. 7,381,689 and any reissue (and any foreign counterparts).

P. "Intangible Assets" means:

(1) know-how, including, but not limited to, recipes, formulas, machine settings, drawings, blueprints, designs, design protocols, standards, design tools, simulation capability, specifications, and application, manufacturing, blending, filtration, and testing techniques or processes;

(2) confidential information or any information that provides an advantage with respect to competitors by virtue of not being known by those competitors, including strategic information, business plans, contract terms, pricing, processes and compilations of information, information concerning customers or vendors, including vendor and customer lists, sales materials, and information regarding methods of doing business.

(3) data concerning historic and current research and development, including but not limited to, designs of experiments, and the results of unsuccessful designs and experiments;

(4) computer software, databases (*e.g.* databases containing technical job histories) and related documentation;

(5) contractual rights, to the extent they are assignable;

(6) all authorizations, permits, licenses, registrations, or other forms of permission, consent, or authority issued, granted, or otherwise made available by or under the authority of any governmental authority; and

(7) Intellectual Property Rights.

Q. "Intellectual Property Rights" means information, designs, creations, inventions, and other intangible property for which exclusive rights are recognized, including but not limited to, patents or patent applications, licenses and sublicenses, copyrights, trademarks, trade secrets, trade names, service marks, and service names.

R. "The License-Back Period" means the six (6) month period following Defendants' completion of the divestitures required by this Final Judgment, during which the Defendants are granted a license to use Champion Deepwater Gulf Production Chemicals with Intellectual Property Rights that have been transferred or licensed to the Acquirer.

S. "Permian" means Permian Mud Service, Inc., a Texas corporation with its headquarters in Houston, Texas, its successors and assigns, and its subsidiaries (including Champion Technologies, Inc.), divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

T. "Production Chemicals" means the blends of chemical intermediates and solvents that are introduced to the wellbore, topside equipment, umbilicals, flowlines or other well infrastructure of an oil or gas well to facilitate the production or flow of hydrocarbons from the wellbore to the topside equipment, protect the well's infrastructure and equipment, remove hazardous or undesirable elements from the hydrocarbons or produced water, and facilitate the separation of oil, gas, and water in the topside equipment.

U. "PCMS" means the provision of production chemical management services, including but not limited to product selection or design, front-end engineering design assistance, manufacture or blending of production chemicals, application of chemicals, or monitoring and testing of well conditions and product efficacy.

V. "Relevant Employees" means all Champion employees whose job responsibilities at any time between January 1, 2012 and the closing of the Transaction related to the provision of Deepwater Gulf PCMS.

W. "Transaction" means Ecolab's acquisition of Permian described in the "Agreement and Plan of Merger" between Ecolab,Permian, OFC Technologies Corp., and John W. Johnson, Steven J. Lindley, and J. Loren Ross, solely in their capacity as the Representatives, dated October 11, 2012, as amended.

X. "Tangible Asset" means any physical asset (excluding real property), including but not limited to:

(1) all machinery, equipment, hardware, spare parts, tools, fixtures, business machines, computer hardware, other information technology assets, furniture, laboratories, supplies, and materials, including but not limited to testing equipment, injection equipment, monitoring equipment, and storage vessels;

(2) improvements, fixed assets, and fixtures pertaining to the real property identified as a Divestiture Asset;

(3) all inventories, raw materials, work-in-process, finished goods, supplies, stock, parts, packaging materials and other accessories related thereto; and

(4) business records including financial records, accounting and credit records, tax records, governmental licenses and permits, bid records, customer lists, customer

contracts, supplier contracts, service agreements; operations records including vessel logs, treatment logs, calendars, and schedules; job records, research and development records, health, environment and safety records, repair and performance records, training records, and all manuals and technical information Defendants provide to their own employees, customers, suppliers, agents or licensees.

## III. APPLICABILITY

This Final Judgment applies to Defendants Ecolab and Permian, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

## IV. DIVESTITURES

A. Defendants are ordered and directed, within ten (10) calendar days after the Court signs the Hold Separate Stipulation and Order in this matter, to divest the Divestiture Assets to the Acquirer in a manner consistent with this Final Judgment. Defendants shall use their best efforts to accomplish the divestitures ordered by this Final Judgment as expeditiously as possible. The United States, in its sole discretion, may extend the time period for any divestiture for an additional period of time not to exceed sixty (60) days.

B. Defendants shall offer to furnish to the Acquirer, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privileges or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to the Acquirer. Any questions that arise during the due diligence process concerning whether particular assets are appropriately considered Divestiture Assets subject to this Final Judgment shall be resolved by the United States, in its sole discretion, consistent with the terms of this Final Judgment.

C. Defendants shall permit the Acquirer of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of the Divestiture Assets; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

D. Defendants shall warrant to the Acquirer that each asset will be operational on the date of sale. Defendants shall maintain and enforce all intellectual property rights licensed to the Acquirer and maintain and protect all trade secrets and confidential information furnished to the Acquirer pursuant to the proposed Final Judgment.

E. Defendants shall not take any action that will impede in any way the permitting, operation, use, or divestiture of the Divestiture Assets.

F. Defendants shall warrant to the Acquirer that there are no material defects in the environmental, zoning or other permits pertaining to the operation of each asset, and that following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

G. At the option of the Acquirer, the Defendants shall enter into a supply agreement, toll manufacturing, or toll blending agreement with the Acquirer to manufacture, blend or supply, any Champion Deepwater Gulf Production Chemical or component(s) thereof for a period of up to one (1) year, which may be extended by the United States, in its sole discretion, for an additional period of time not to exceed one (1) year. The Defendants shall manufacture and blend the Champion Deepwater Gulf Production Chemicals or chemical intermediates using the manufacturing, blending and quality assurance procedures used by Champion directly preceding the Divestiture unless the Acquirer authorizes a change. The Defendants shall also procure the raw materials or intermediates used to make the Champion Deepwater Gulf Production Chemicals from the same source used by Champion directly preceding the Divestiture unless the Acquirer authorizes a change. For each year of the tolling agreement, the Defendants shall supply up to 120% of the volume of Champion Deepwater Gulf Production Chemicals sold in the Deepwater Gulf in the prior year. The terms and conditions of such agreement shall be commercially reasonable and shall be subject to the approval of the United States, in its sole discretion.

H. At the option of the Defendants, the Acquirer shall enter into an agreement to provide the Defendants with:

(1) Non-exclusive, non-transferable fully paid-up licenses to provide any Champion Deepwater Production Chemical to Champion Deepwater Gulf PCMS Customers, for use in the Deepwater Gulf during the License-Back Period. Such licenses will be for the sole purpose of enabling the Defendants to continue providing those chemicals to a Champion Deepwater Gulf Customer during the License-Back Period. The United States, in its sole discretion, may agree to an extension of the License-Back Period with respect to a particular customer for an additional period not to exceed six (6) months upon a showing of good cause, during which time the Defendants will retain the license to provide Champion Deepwater Production Chemicals to that particular Champion Deepwater Gulf PCMS Customer. The extension of this period with respect to a particular Champion Deepwater Gulf PCMS Customer

does not alter the License-Back Period applicable to other Champion Deepwater Gulf PCMS Customers; and

(2) A perpetual, non-exclusive, non-transferable, fully paid-up license to make, have made, use, or sell HI43 outside the Deepwater Gulf. The terms and conditions of any contractual arrangement intended to satisfy this provision must be reasonably related to market conditions for such licenses. Such license may, at the Acquirer's discretion, require the Defendants to grant back to the Acquirer any modifications or improvements made by the Defendants to HI43.

I. The Defendants shall use their best efforts to assign, subcontract, or otherwise transfer to the Acquirer any (i) contract to provide PCMS in the Deepwater Gulf, or (ii) portion of a Master Service Agreement or global agreement, including Call-off Agreements, between Champion and a Champion Deepwater Gulf PCMS Customer relating to the provision of Champion Deepwater Gulf PCMS in the Deepwater Gulf. To this end, the Defendants shall notify each Champion Deepwater Gulf PCMS Customer of the terms of this Final Judgment; release the Champion Deepwater Gulf PCMS Customer of any notice requirements or obligations that require the customer to use Champion's services or refrain from using another supplier's services with respect to any Deepwater Gulf assets; introduce the Acquirer to each Customer, request each Customer's consent to assign that Customer's contract to the Acquirer; and specifically inform each such Customer that the Defendants' rights to the divested Champion Deepwater Gulf Production Chemicals, in Deepwater Gulf, expire after six (6) months. The Defendants shall not encourage any Champion Deepwater Gulf Customer to request an extension of the License-Back Period.

J. At the option of the Acquirer, Defendants shall enter into a transition services agreement with that Acquirer sufficient to meet the Acquirer's needs for assistance in matters relating to the design, manufacture, formulation, testing, provision, or application of Production Chemicals and related services to any Champion Deepwater Gulf Customer for a period of up to three (3) months. The Acquirer may exercise this option during the License-Back Period and for three (3) months thereafter. The Defendant must make the personnel providing the transition services available during normal business hours. The terms and conditions of any contractual arrangement intended to satisfy this provision must be reasonably related to the market value of the expertise of the personnel providing any needed assistance.

K. For a period of two (2) years following completion of the divestitures required by this Final Judgment, Defendants shall not, directly or indirectly, assign any Customer-Facing Relevant Employee to provide PCMS in the Deepwater Gulf to a Champion Deepwater Gulf PCMS Customer at a Deepwater Gulf Well or Platform for which the employee provided PCMS, directly or indirectly, while employed by Champion, except in connection with services provided to a Champion Deepwater Gulf PCMS Customer during the applicable License-Back Period for that customer.

L. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by trustee appointed pursuant to Section VI, of this Final Judgment, shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing business engaged in the provision of PCMS for oil and gas wells located in the Deepwater Gulf, and that such divestiture will remedy the competitive harm alleged in the Complaint. The divestiture, whether pursuant to Section IV or Section VI of this Final Judgment,

(1) shall be made to an acquirer that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the business of providing PCMS for oil and gas wells in the Deepwater Gulf; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an acquirer and Defendants give Defendants the ability unreasonably to raise the acquirer's costs, to lower the acquirer's efficiency, or otherwise to interfere in the ability of the acquirer to compete effectively.

## V. RIGHT TO HIRE

A. The Acquirer shall have the right to hire Relevant Employees while the License-Back Period is in effect with respect to any Champion Deepwater Gulf PCMS Customer. To enable the Acquirer to make offers of employment, Defendants shall provide the Acquirer and the United States with organization charts and information relating to Relevant Employees, including name, job title, past experience relating to development, production, sale or administration of Production Chemicals for use in oil or gas wells in the Deepwater Gulf, responsibilities, training and educational history, relevant certifications, and, to the extent permissible by law, job performance evaluations, and current salary and benefits information.

B. Upon request, Defendants shall make the Relevant Employees available for interviews with the Acquirer during normal business hours at a mutually agreeable location and will not interfere with any negotiations by the Acquirer to employ the Relevant Employees. Interference with respect to this paragraph includes, but is not limited to, offering to increase the salary or benefits of Relevant Employees other than as a part of a company-wide increase in salary or benefits granted in the ordinary course of business.

C. For Relevant Employees who elect employment by the Acquirer, Defendants shall waive all non-compete agreements and all nondisclosure agreements, except as specified below, vest all unvested pension and other equity rights, and provide all benefits to which the Relevant Employees would generally be provided if transferred to a buyer of an ongoing business. For a period of twelve (12) months after the Acquirer's right to hire expires, the Defendants shall not solicit to hire, or hire, any Relevant Employee hired by the Acquirer, unless (1) such individual is terminated or laid off by the Acquirer or (2) the Acquirer agrees in writing that Defendants may solicit or hire that individual.

D. Nothing in this Section shall prohibit Defendants from maintaining any reasonable restrictions on the disclosure by an employee who accepts an offer of employment with the Acquirer of the Defendants' proprietary non-public information that is (1) not otherwise required to be disclosed by this Final Judgment and (2) unrelated to the Divestiture Assets.

## VI. APPOINTMENT OF TRUSTEE

A. If the Defendants have not divested the Divestiture Assets within the time period specified in Section IV(A), Defendants shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the divestitures to acquirers acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of

Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section VI(D) of this Final Judgment, the trustee may hire at the cost and expense of the Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestitures.

C. Defendants shall not object to sales by the trustee on any ground other than the trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the trustee within ten calendar days after the trustee has provided the notice required under Section VII.

D. The trustee shall serve at the cost and expense of Defendants, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to Defendants and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestitures and the speed with which it is accomplished, but timeliness is paramount.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestitures. The Defendants' failure to comply with Section IV(A) does not relieve the Defendants of their obligations to comply with the remainder of the terms in this Final Judgment. If a trustee is appointed, the acquirer procured by the trustee shall be deemed the Acquirer referenced in this Final Judgment. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and Defendants shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendants shall take no action to interfere with or to impede the trustee's accomplishment of the divestitures.

F. After its appointment, the trustee shall file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the divestitures ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the trustee has not accomplished the divestitures ordered under this Final Judgment within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth: (i) the trustee's efforts to accomplish the required divestitures; (ii) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished; and (iii) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

## VII. NOTICE OF PROPOSED DIVESTITURES

A. Within two (2) business days following execution of a definitive contract for sale of any of the Divestiture Assets, Defendants or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Sections IV or VI of this Final Judgment, and submit to the United States a copy of the proposed contract for sale and any other agreements with the Acquirer relating to the Divestiture Assets. If the trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from Defendants, the proposed Acquirer, any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirers. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States shall provide written notice to Defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture, provided, however, that the United States may extend the period for its review up to an additional thirty (30) calendar days. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Section VI(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

## VIII. FINANCING

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or VI of this Final Judgment.

## IX. HOLD SEPARATE

Until the divestitures required by this Final Judgment have been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by the Court. Defendants shall take no action that would jeopardize the divestiture ordered by the Court.

## X. AFFIDAVITS

A. Within fifteen (15) calendar days after the Court signs the Hold Separate Stipulation and Order in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or VI, Defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with Sections IV or VI of this

Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Defendants have taken to solicit buyers for the Divestiture Assets and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, Defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section IX of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

## XI. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Hold Separate Stipulation and Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice Antitrust Division, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) Access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) To interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

## XII. NO REACQUISITION

Defendants may not reacquire any of the Divestiture Assets during the term of this Final Judgment.

## XIII. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to the Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

## XIV. EXPIRATION OF FINAL JUDGMENT

Unless the Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

## XV. PUBLIC INTEREST DETERMINATION

The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive

Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Dated: ______________________________

[Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16]

[TO BE SIGNED AFTER SUCH PROCEDURES]

___________________________________
United States District Judge

## Schedule A

| Material Description | Product Category |
|---|---|
| Defoamer V-149 | Anti-Foam Production Chemicals |
| Defoamer V-151 | Anti-Foam Production Chemicals |
| Defoamer V-159 | Anti-Foam Production Chemicals |
| Flotron M-239DW | Asphaltene Production Chemicals |
| Flotron M-267DW | Asphaltene Production Chemicals |
| Flotron PA-1000 | Asphaltene Production Chemicals |
| Flotron M-239 | Asphaltene Production Chemicals |
| Bactron K-103 | Biocides Production Chemicals |
| Bactron K-95 | Biocides Production Chemicals |
| Surfatron DQ-91 | Biocides Production Chemicals |
| RPA-102 | Boiler Water Process Additives |
| Capclean H-101DW | Capillary Cleaning Production Chemicals |
| Capclean H-102DW | Capillary Cleaning Production Chemicals |
| Capclean W-202DW | Capillary Cleaning Production Chemicals |
| Acetic Acid, Glacial | Commodity Production Chemicals |
| BC-215 | Commodity Production Chemicals |
| Toluene | Commodity Production Chemicals |
| Xylene | Commodity Production Chemicals |
| XyleneDW | Commodity Production Chemicals |
| Cortron HRU-100 | Corrosion Production Chemicals |
| Cortron R-228 | Corrosion Production Chemicals |
| Cortron R-856 | Corrosion Production Chemicals |
| Cortron RN-177 | Corrosion Production Chemicals |
| Cortron RN-261 | Corrosion Production Chemicals |
| Cortron RN-384 | Corrosion Production Chemicals |
| Cortron RN-406 | Corrosion Production Chemicals |
| Cortron RN-466 | Corrosion Production Chemicals |
| Cortron RN-488 | Corrosion Production Chemicals |
| Cortron RU-142 | Corrosion Production Chemicals |
| Cortron RN-261FB | Corrosion Production Chemicals |
| Cortron RN-466FB | Corrosion Production Chemicals |
| Cortron RN-488DW | Corrosion Production Chemicals |
| Cortron RN-488FB | Corrosion Production Chemicals |
| Emulsotron X-1021 | Demulsifiers Production Chemicals |

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| Emulsotron X-1164 | Demulsifiers Production Chemicals |
| Emulsotron X-1329 | Demulsifiers Production Chemicals |
| Emulsotron X-1523 | Demulsifiers Production Chemicals |
| Emulsotron X-1523DW | Demulsifiers Production Chemicals |
| Emulsotron X-1665 | Demulsifiers Production Chemicals |
| Emulsotron X-1678 | Demulsifiers Production Chemicals |
| Emulsotron X-1808 | Demulsifiers Production Chemicals |
| Emulsotron X-203 | Demulsifiers Production Chemicals |
| Emulsotron X-316 | Demulsifiers Production Chemicals |
| Emulsotron X-421 | Demulsifiers Production Chemicals |
| Emulsotron X436B5 | Demulsifiers Production Chemicals |
| Emulsotron X-917 | Demulsifiers Production Chemicals |
| Emulsotron X-606 | Demulsifiers Production Chemicals |
| Emulsotron X-715 | Demulsifiers Production Chemicals |
| Emulsotron X-716 | Demulsifiers Production Chemicals |
| Emulsotron X-8292 | Demulsifiers Production Chemicals |
| Emulsotron X-942 | Demulsifiers Production Chemicals |
| FlowPlus DR-2000C | Flow Improvers Production Chemicals |
| Surfatron DQ-76 | General Surfactants Production Chemicals |
| Surfatron DQ-86 | General Surfactants Production Chemicals |
| Assure HI-43DW | Hydrate Production Chemicals |
| Assure HI-57DW | Hydrate Production Chemicals |
| Assure HI-81 | Hydrate Production Chemicals |
| Flexoil FM-230DW | Paraffin Production Chemicals |
| Flexoil FM-102DW | Paraffin Production Chemicals |
| Flexoil FM-192DW | Paraffin Production Chemicals |
| Flotron M-261DW | Paraffin Production Chemicals |
| Flotron M-55 | Paraffin Production Chemicals |
| Gyptron EGP-5015 | Scale Production Chemicals |
| Gyptron SA1110N | Scale Production Chemicals |
| Gyptron T-182 | Scale Production Chemicals |
| Gyptron T-255 | Scale Production Chemicals |
| Gyptron T-494 | Scale Production Chemicals |
| Gyptron T-94 | Scale Production Chemicals |
| Gyptron TA-13 | Scale Production Chemicals |
| Hydrochloric Acid, HCL, 15% | Scale Production Chemicals |
| Hydrochloric Acid, HCL, 5% | Scale Production Chemicals |
| Gyptron TA-21 | Scale Production Chemicals |

| | |
|---|---|
| Hydrochloric Acid | Scale Production Chemicals |
| Gas Treat 164 | Scavengers Production Chemicals |
| Gas Treat 164FB | Scavengers Production Chemicals |
| Gas Treat 164FBC | Scavengers Production Chemicals |
| Cleartron HZB-48 | Water Clarifier Production Chemicals |
| Cleartron HZB-49 | Water Clarifier Production Chemicals |
| Cleartron PZ-20000 | Water Clarifier Production Chemicals |
| Cleartron ZB-103 | Water Clarifier Production Chemicals |
| Cleartron ZB-165 | Water Clarifier Production Chemicals |
| Cleartron ZB-167 | Water Clarifier Production Chemicals |
| Cleartron ZB-258 | Water Clarifier Production Chemicals |
| Cleartron ZB-279 | Water Clarifier Production Chemicals |
| Cleartron ZB-307 | Water Clarifier Production Chemicals |
| Cleartron ZB-374 | Water Clarifier Production Chemicals |
| Cleartron ZB-45 | Water Clarifier Production Chemicals |
| Cleartron ZB-543 | Water Clarifier Production Chemicals |
| Cleartron PZ-15000FB | Water Clarifier Production Chemicals |
| Cleartron ZB-582 | Water Clarifier Production Chemicals |
| Cleartron ZB-83 | Water Clarifier Production Chemicals |

**Schedule B**

| Equipment Name | General Purpose |
|---|---|
| Densitometer | Product density |
| FTIR | General product fingerprinting |
| Brookfield viscometer | Product viscosity |
| NVR analyzer | Product activity measurement |
| Particle size analyzer | Particle size for deepwater products |
| Shaker for particle testing | Homogenizing |
| pH meter | pH measurement |
| Hot bath, cold bath | General purpose |
| Refrigerator | General purpose |
| KF titrator | Water content analyzer |
| Centrifuge | General purpose |
| UV-Vis | General purpose for water analysis |
| DSC | Was appearance temperature for an oil |
| HTGC | Was content and wax distribution of an oil |
| ICP | Water analysis, cations |
| IC | Water analysis, anions |
| AA | Water analysis (obsolete with ICP) |
| Balance | Various top loader and analysis balances |
| Cold finger | Wax inhibitor screening |

| | |
|---|---|
| Turbiscan | Asphaltene inhibitor screening |
| Hot bath, cold bath, hot plate | Pour point testing, scale bottle testing, phase sep bottle testing, compatibility |
| Bottle shaker | For shaking bottles |
| Incubator | For bacteria bug bottles |
| ATP meter | Bacteria rapid screen test |
| IR Meter | Oil in water measurements |
| Top stirred autoclave for AAHI testing (5000 psi) | Low pressure hydrate autoclave |
| High pressure long term static stability test | Long term high pressure stability testing, built for one customer |
| Refrigerated centrifuge | Accelerates the product aging process by adding centrifugal force |
| Iotrascan | Saturate, aromatic, resins, and asphaltene analysis |
| Hydrate Rocking Cell (5000 psi) | Standard hydrate rocking cell |
| Defoamer test at pressurized conditions | Oil can be mixed with gas and depressurized to ambient conditions |

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